Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
Unbundled Access to Network Elements	)	WC Docket No. 04-313
Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers	)	CC Docket No. 01-338

COMMENTS OF THE AMERICAN PUBLIC COMMUNICATIONS COUNCIL, DATANET SYSTEMS, LLC, ERNEST COMMUNICATIONS, INC., METTEL, NAVIGATOR TELECOMMUNICATIONS, LLC, NII COMMUNICATIONS, NY TELSAVE, and SYMTELCO, LLC

Albert H. Kramer
Robert F. Aldrich
Jacob S. Farber
Dickstein Shapiro Morin & Oshinsky LLP
2101 L Street, N.W.
Washington, DC 20037-1526
(202) 828-2226

Attorneys for the Payphone Commenters

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SUMMARY

The provision of local exchange service to payphone service providers ("PSPs") is a discrete segment of the local exchange service market. In determining what unbundled network elements should be available to competitive local exchange carriers ("CLECs") attempting to serve this market segment, the Commission must give weight to the goals of Section 276 of the Communications Act, which directs the Commission to "promote payphone competition and the widespread deployment of payphone services to the benefit of the general public." 47 U.S.C. §276(b)(1). By ensuring that CLECs have an opportunity to compete to provide local service to PSPs, the Commission will not only advance the local service competition goals of Section 251 but will also promote the payphone competition and deployment goals of Section 276. Widespread payphone deployment in turn uniquely promotes the fundamental goals of the Communications Act, to support national defense, public safety, and universal availability of communications, because only payphones can ensure that reliable means of communications are available to all people everywhere, particularly in local and national emergencies.

Payphones constitute a distinct segment of the local service market. Unlike other customers, a PSP typically has many dispersed locations with one or a few lines at each location. As a result, DS1 and broadband facilities are of little use to the payphone segment of the market. Moreover, CLECs' costs of serving payphones with self-provisioned switches are likely to be greater, and their revenues less, than the costs and revenues involved in serving the mass market.

The court of appeals has required the Commission to consider evidence that "markets vary decisively (by reference to its impairment criteria)" and has affirmed the Commission's consideration of other goals of the Communications Act in determining whether unbundled network elements should be available to CLECs. *USTA v. FCC*, 359 F.3d 554, 570, 579-82 (D.C. Cir. 2004). In light of the distinct character of the payphone segment of the local service market and the important role of payphones in the scheme of the Act, the Commission must undertake a distinct analysis for the payphone market segment. The Commission must not submerge the payphone market segment within a larger market with different material characteristics at the cost of hindering the Act's goals of promoting payphone competition and deployment. Moreover, the Commission must resolve close questions of fact in favor of finding impairment in the payphone market segment. Finally, even if the Commission cannot find "impairment" in the statutory sense, the Commission can and should consider the impact of its decision on the payphone-specific objectives of the Act.

As a market made up predominantly of low-line-count locations, the payphone market segment shares with the mass market all the characteristics that justified the Commission's presumption that switch-based CLECs' ability to serve the mass market is impaired. Relatively few payphones are currently served by switch-based CLECs. There is little, if any potential for the use of DS1 lines or intermodal alternatives to provide service to payphones. The same "hot cut" related disruptions and costs that afflict the mass market also afflict the payphone market segment. Other operational and economic factors also pose at least as high an entry barrier to switch-based CLECs attempting to serve the payphone market segment as to switch-based CLECs serving the mass market. Therefore, if the Commission finds that switch-based CLECs are

impaired with respect to the mass market, it must also find that switch-based CLECs are impaired in providing service to PSPs.

But even if the Commission does not find that switch-based CLECs are impaired in serving the mass market, it must still find that they are impaired in their ability to serve the payphone segment of the local service market. Switch-based CLECs serving the mass market would incur significantly higher costs in adding payphone customers to their customer base than in adding more mass market customers.

To serve the payphone segment of the market, a switch-based CLEC must ensure that its switches can provide a variety of features essential to PSPs, including Flex ANI, a software-driven feature that generates software-defined coding digits that are transmitted with each payphone call. CLECs must provide Flex ANI capability in order to serve PSPs, because Flex ANI provides the unique coding digits that must be transmitted to interexchange carriers so that PSPs can receive compensation for the toll-free calls originating from their payphones. CLECs would incur substantial costs to purchase Flex ANI for their switches, and would have to serve hundreds of payphone lines from a single switch in order to recover their investment in Flex ANI technology. There are few areas where a CLEC can expect to reach that level of penetration of the PSP market.

CLECs must incur additional costs to provide the monthly payphone-line verification capability that LECs must provide to support PSPs collection of compensation. In addition, CLECs cannot offer comprehensive service to PSPs without incurring additional costs in order to ensure that they have switches and collocation sites within reach of all locations where their customers have payphones.

Finally, the revenue opportunities available from providing service to PSPs are considerably less on a per-line basis than for the typical mass market customer. There are no significant opportunities to sell vertical services to PSPs. There are no meaningful opportunities to sell internet and broadband services to PSPs. And even basic service revenue opportunities are limited, with CLECs' per-line revenues averaging around $20-$25 per month.

As a result of these greater costs and more limited revenue opportunities, any tests established by the Commission to determine whether switch-based CLECs are impaired in serving the mass market will underestimate the level of impairment in the payphone segment of the market. Yet, any doubts as to whether switch-based CLECs are impaired in their ability to serve PSPs must be resolved in favor of impairment in order to ensure that the Commission's UNE rules do not hinder the payphone competition and deployment objectives of the Act. And in any event, even if the cost-revenue barriers encountered by switch-based CLECs in the payphone segment of the market do not meet the statutory "impairment" standard, the Commission should still require the continued availability of unbundled switching in order to advance the goals of Section 276.

Resale opportunities for CLECs are far too limited to alter this conclusion. Moreover, making unbundled switching available to CLECs serving the payphone segment of the market will have no noticeable impact on universal service, and in fact will contribute to universal service by making more payphones available to people without residential telephone service.

In summary, if the Commission finds that switch-based CLECs are impaired in serving the mass market, it must also find that they are impaired in serving the

payphone segment of the local service market. But even if the Commission does not find impairment in the mass market, there is ample evidence to find CLECs impaired in serving the payphone market. And even if the Commission finds that evidence inconclusive, it should require unbundled switching to remain available to CLECs serving the payphone market segment in order to promote the payphone competition and widespread payphone deployment objectives of Section 276.

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The American Public Communications Council ("APCC"), DataNet Systems, LLC, Ernest Communications, Inc., MetTel, Navigator Telecommunications, LLC, Nii Communications, NY Telsave, and Symtelco, LLC, ("Payphone Commenters") hereby submit comments on the Commission's Order and Further Notice of Proposed Rulemaking in this proceeding.[1] The comments focus on the discrete segment of the

[1] Order and Notice of Proposed Rulemaking, FCC 04-179 (Aug. 20, 2004) ("*Further Notice*"). APCC is the national trade association of payphone service providers ("PSPs") and the other Payphone Commenters are CLECs who provide local exchange service to PSPs.

local exchange service market in which competitive local exchange carriers ("CLECs") are attempting to compete with incumbent local exchange carriers ("ILECs") and with each other in the provision of local exchange service to payphone service providers. In this distinct market, switch-based CLECs tried to establish themselves and failed. Resellers also tried and failed. Only UNE-P has enabled CLECs to provide a viable competitive alternative to the ILECs. As shown in detail below, without the availability of unbundled switching, CLECs will be impaired in their ability to serve the payphone segment of the local service market. To promote the payphone-specific goals of the Act, the Commission must continue making unbundled switching available to CLECs for service to PSPs—even if the Commission decides that it is no longer necessary to make unbundled switching available to CLECs for purposes of serving the mass market in general.

BACKGROUND

Historically, only ILECs were able to provide payphones for use by the public, because other providers were prohibited from attaching payphones to the ILEC network. Independent (*i.e.*, non-ILEC) PSPs only began to emerge twenty years ago, after the Commission amended its Part 68 rules to authorize the connection of independently-owned payphones to the local network.[2] In 2003, FCC statistics indicated that independent PSPs operated more than half a million payphones, with the

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[2] *Registration of Coin Operated Telephones under Part 68 of the Commission's Rules and Regulations*, Memorandum Opinion and Order, 57 Rad. Reg. 2d (P & F) 133 (1984).

ILECs operating somewhat less than one million, for a total payphone base of roughly 1.5 million.[3]

Since the advent of the independent PSP industry, the ILECs have played two distinct roles with respect to payphones. First, they provide payphone service to the general public through their payphone divisions, which continue to own the majority of the nation's payphones. Second, the ILECs provide local exchange services to independent PSPs, as well as the ILECs' own payphone operations.[4] Thus, ILECs provide exchange service to independent PSPs while competing with them in providing payphone services to the consuming public.

In the Telecommunications Act of 1996, Congress recognized the emergence of PSPs as a distinct segment of the telecommunications industry and attempted to the level the playing field on which independent PSPs and ILEC payphone divisions

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[3] FCC, Wireline Competition Bureau, Industry Analysis and Technology Division, *Trends in Telephone Service,* Table 7.5 (May 2004). These statistics do not reflect the recent exits of BellSouth and Qwest from the payphone business. *See, e.g. Qwest Hangs Up on Payphone Business,* Denver Post (May 7, 2004). Thus, the percentage of the industry represented by independent payphones should be significantly higher in 2005.

[4] In its initial order implementing Sections 251 and 252 of the Act, the Commission recognized the distinction between the payphone service market, in which PSPs compete with each other in providing service to the public, and the PSP segment of the local exchange service market, in which CLECs attempt to compete with ILECs to provide the local exchange service needed by PSPs. The Commission considered the markets sufficiently distinct that it expressly differentiated between (1) CLECs, who have rights under Sections 251 and 252 to obtain unbundled network elements or subscribe to ILECs' payphone line service at wholesale rates for purposes of "retailing" payphone lines to PSPs, and (2) PSPs themselves, who have no Section 251 and 252 rights as PSPs. *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996,* First Report and Order, 11 FCC Rcd 15499, ¶¶ 868, 870, 876 (1996).

compete to provide payphone service to the public. Section 276 of the Act directs the FCC to promote payphone services competition and "the widespread deployment of payphone services to the benefit of the general public." 47 U.S.C. § 276(b)(1). In its rules implementing Section 276, the Commission deregulated ILEC payphone services, adopted rules to eliminate ILEC subsidies and discrimination in favor of ILEC payphone services, and provided a uniform compensation scheme for all PSPs – ILEC and independent.[5]

In order to offer their services to the public, PSPs must purchase specialized local exchange service for their payphone lines.[6] Since 1996, CLECs have tried various strategies in attempting to offer PSPs a competitive alternative to the ILECs' local exchange service.[7] Switch-based CLECs, however, have uniformly failed to make inroads into the ILECs' independent PSP customer base. The few switch-based CLECs

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[5] *See Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, CC Dkt. No. 96-128, Report and Order, 11 FCC Rcd 20541 (1996) ("*First Payphone Order*"), *recon.* 11 FCC Rcd 21233 (1996) ("*First Payphone Reconsideration Order*"), *aff'd in relevant part, Ill. Pub. Telecomms. Ass'n v. FCC*, 117 F.3d 555 (D.C. Cir. 1997), *cert denied, Virginia State Corp. Comm'n v. FCC*, 523 U.S. 1046 (1998).

[6] *See Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, Memorandum Opinion and Order, 13 FCC Rcd 4998 (Com. Car. Bur. 1998) ("*Coding Digit Waiver Order*") (requiring LECs to equip payphone lines with "Flex ANI" information digits).

[7] In theory, CLECs are free to compete to provide local service connections for the ILECs' payphones as well as independently operated payphones. Under the Commission's rules implementing Section 276, ILEC payphone operations are supposed to be separated, at least as an accounting matter, from the ILECs' local exchange operations. As a practical matter, however, CLECs are unlikely to succeed in displacing ILECs in the provision of local service to the ILECs' own payphones.

that have attempted to serve PSPs have gone bankrupt, exited the market, or are providing only a *de minimis* amount of service to PSPs.

CLECs have also attempted to provide local service to PSPs by reselling ILEC services pursuant to Section 251(c)(4) of the Act. The resale strategy too has been unsuccessful.

CLECs *have* been successful, however, in serving the PSP market by utilizing the combination of unbundled loops, switching, and transport known as "UNE-P." Today, numerous CLECs provide UNE-P based service to PSPs, serving well over 100,000 payphones. Some PSPs, moreover, depend solely on service provided by CLECs with UNE-P.

The availability of competitive alternatives to the ILEC is critical because local exchange service is the single largest expense item faced by many if not most PSPs. PSPs are as dependent on reliable local exchange service as any other telecommunications service provider.[8] Accordingly, the emergence of *local service* competition under the scheme of Sections 251 and 252 of the Act is critical to the ultimate success of the Section 276 policy to promote *payphone* deployment and competition.

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[8] The Telecommunications Act of 1996 recognizes PSPs as telecommunications service providers. It does not, however, classify PSPs as "telecommunications carriers." Rather, the Telecommunications Act classifies PSPs as "aggregators." 47 U.S.C. §§ 3(44) (excluding aggregators from "telecommunications carrier" definition), 226(a)(2) (defining "aggregator" to include PSPs).

DISCUSSION

In this remand proceeding, the Commission is under a court mandate to ensure that it undertakes a sufficiently "granular" analysis of the extent to which CLECs are impaired in serving various local service market segments. As the court of appeals stated in *USTA II*:[9]

> [T]he Commission cannot proceed by very broad national categories where there is evidence that markets vary decisively (by reference to its impairment criteria), at least not without exploring the possibility of more nuanced alternatives and reasonably rejecting them.

USTA II at 21. As explained in more detail below, the provision of local service to PSPs is a discrete segment of the local service market, clearly distinguishable from both the "enterprise" and "mass market" segments. PSPs require special services from LECs to support their payphone service operations, and the costs and revenue opportunities are significantly different from the enterprise market and the mass market. In addition, to ensure implementation of the payphone service competition and payphone deployment objectives of the Section 276, the Commission must take particular care to ensure that local service alternatives are available to PSPs.

As explained below, even if switch-based CLECs are able to overcome the barriers to entry that the Commission identified in the *TRO*[10] with respect to the mass market, switch-based CLECs will continue to be impaired in their ability to enter the PSP segment of the local service market. Therefore, even if the Commission eliminates

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9 *USTA v. FCC*, 359 F.3d 554, 570 (D.C. Cir. 2004).

10 *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, 18 FCC Rcd 16978 (2003) ("*TRO*").

unbundled local switching for other markets, the Commission must require ILECs to continue to make unbundled local switching available to CLECs serving the payphone segment of the local service market.[11]

I. THE MARKET FOR LOCAL EXCHANGE SERVICE TO PAYPHONES REQUIRES A SEPARATE ANALYSIS UNDER SECTION 251(d)(2)

A. Under The Telecommunications Act, The Commission Has An Affirmative Obligation To Promote Payphone Competition And The Widespread Deployment Of Payphones

There are important legal and policy reasons why the Commission must treat the payphone segment of the local service market separately from other markets. In their review of the Commission's prior decisions on unbundled network elements, the courts have consistently stressed that the Commission's impairment analysis and unbundling rules must be "rationally related to the goals of the Act." *AT&T Corp. v. Iowa Utilities Board*, 525 U.S. 366, 388 (1999); *USTA v. FCC*, 290 F. 3d 415, 428 (D.C. Cir. 2002) ("*USTA I*"); *USTA II*, 359 F.3d at 562-63. As the D.C. Circuit found, this requires a "balanc[ing]" of the costs and benefits of unbundling with other considerations relevant to the Act. *See USTA II* at 562-63. The Commission engaged in just such a balancing in the *TRO* in deciding not to require unbundling of hybrid loops. The Commission read Section 252(d)(2)'s "at a minimum" language as permitting the Commission to balance ILEC investment disincentives against an impairment finding. The Commission found that

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[11] In addition to unbundled local switching, access to several other unbundled network elements ("UNEs") is required in order to offer service via UNE-P. For ease of reference, the Payphone Commenters refer to unbundled local switching throughout these comments. The Commission, however, must find that CLECs are impaired with respect to all of the UNEs necessary to provide local exchange service to PSPs.

the investment disincentives resulting from a hybrid-loop-unbundling requirement would hinder the goal of removing barriers to infrastructure investment – which Section 706 of the Act requires the Commission to pursue – and the harm to this goal would outweigh the benefits of unbundling to the goals of Section 251. *TRO*, ¶¶ 286, 288, 290. The *USTA II* court upheld this balancing, finding that it was within the Commission's discretion to factor other goals of the Act into its impairment analysis. *USTA II* at 579-82.

Although the Court balanced the need for unbundling with factors that militate against unbundling, the "rationally related" analysis applies with no less force to statutory goals that weigh in favor of unbundling. In particular, in determining which unbundled elements CLECs require in order to provide local service to the payphone segment of the market, the Commission must give weight to Section 276's directive to "promote competition among payphone service providers and promote the widespread deployment of payphone services to the benefit of the general public" (47 U.S.C. § 276(b)(1)). In addition, the Commission must give weight to the more general goals of the Act to promote public safety and universal availability of communications (47 U.S.C. § 151), which are directly advanced by promoting the deployment of payphones. In adopting regulations to carry out Section 251, the Commission has a duty to ensure that its regulations also further, or at least do not frustrate, the goals of Sections 151 and 276. As discussed below, there are direct links between the promotion of competition in the provision of local telecommunications service and Section 276's requirement to promote "competition among payphone service providers" and "widespread deployment of payphone services." The Commission's unbundling rules can

significantly advance these goals, but only if they permit CLECs to compete effectively to serve the payphone segment of the local exchange market.

1. Competition among LECs to serve the payphone segment of the local services market promotes the statutory goal of promoting competition among PSPs in the downstream payphone service market

As the Supreme Court has explained, in enacting Section 251 Congress sought to promote local service competition both as "an end in itself" and as "an important step toward the Act's other goals," including "boosting competition in broader markets." *Verizon Communications v. FCC*, 535 U.S. 467, 476 (2002). One of those "broader markets," of course, is the payphone service market itself, where there is an express statutory mandate to promote competition. By promoting competition in the provision of local service to PSPs, the Commission also promotes competition among PSPs, by ensuring that competitors are not dependent on the ILEC (who also competes in the payphone service market) as the only source for the critical exchange services on which they depend. By ensuring that CLECs have an opportunity to compete to provide local service to payphones, the Commission will "boost" competition in the payphone service market itself, furthering the goal of Section 276.

2. Local service competition to serve PSPs promotes the statutory goal of widespread deployment of payphones

Promoting local service competition to serve the payphone segment of the local exchange market will also further the second policy of Section 276, to promote the widespread deployment of payphone services. By establishing this policy, Section 276 recognizes that payphones are a unique telecommunications resource that play a key role in achieving the Act's overarching goals of universal telecommunications service,

national defense, and public safety, *see* 47 U.S.C. § 151. Approximately 1.5 million payphones throughout the country play a unique and critical role in providing Americans with access to the telecommunications network. FCC, Wireline Competition Bureau, Industry Analysis and Technology Division, *Trends in Telephone Service*, Table 7.5 (November 2004). Even with the boom in wireless communications, roughly half of all Americans still do not own a wireless phone and many, for financial or other reasons, never will. *Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993*, Eighth Report, WT Docket No. 02-379, FCC 03-150, ¶ 17 (July 14, 2003). Moreover, five million households do not have any telephone at all; for the individuals in these households, payphones are the primary means of placing calls. FCC, Wireline Competition Bureau, Industry Analysis and Technology Division, *Telephone Subscribership in the United States*, Table 1 (November 2003).

Payphone service is a unique service that is used in every stratum of society in all neighborhoods and regions of the country. Payphone service is a dial-tone-on-demand, per-use-priced wireline service available twenty-four hours a day, seven days a week, 365 days a year. Users are not required to make an initial investment in equipment, await activation of the service or pay recurring monthly charges. No other communications service has these characteristics.

Victims of domestic violence and child abuse (and other callers who do not want a record of the call available to family members) must rely on payphones. Payphones are used by many Americans for local or 800 calls to social service agencies (employment, homeless shelters, social security, etc.). It is not surprising therefore that more than 300 community associations and social service organizations have expressed their support for ready access to payphones. *See e.g.*, Letter to Chairman Michael K.

Powell, FCC, from Cathy Jackson, Community Voice Mail, and 317 other community service organizations, June 6, 2001, submitted in *Wisconsin Public Service Commission*, CCB/CPD No. 00-1.

Even for the half of the population that does have wireless phones, payphones remain a critical supplementary method of accessing the public communications network. Wireless phones often get left at home or the office, have dead batteries, experience weak or non-existent signals or encounter network congestion.

The limits of wireless service and the value of reliable payphone service were demonstrated in the Summer of 2003 during the power failure that hit much of the northeast. By one account "payphones pulled a Clark Kent trick . . . morphing into the superheroes of urgent, reliable communications for millions of stranded and stressed Northeasterners." *Payphone Served Valuable Role During Blackout as Call Volumes More Than Tripled at Verizon's Curbside Phones*, PR Newswire (August 20, 2003). Wireless phones, on the other hand, failed as a result of congestion and the lack of power. If it were not for the availability of payphones, many people would have been unable to tell loved ones that they were stranded or have arranged for alternative ways home. Similarly, payphones also played a vital role during the September 11, 2001 attacks. They provided the only reliably means of emergency communications for thousands of New York City residents and emergency services personnel. *See, e.g., Attacks Paralyze New York*, BBC News (Sep. 11, 2001) (available at http://news.bbc.co.uk/1/hi/world/americas/1538756.stm).

While payphones are valuable to everyone, they are perhaps most critical to those who cannot afford either a wireless phone or a home phone. As discussed above, as of March 2003, approximately 5 million households did not have a home phone.

Telephone Subscribership in the United States, Table 1. Most of these households are poor and a disproportionate number of them are minorities. *Id.*, Tables 4 and 7. Ready, affordable access to the network through payphones is vital for this group. *See, e.g.*, Rob Borsellino, *Yanking pay phones is like pulling the plug on people's lives*, Sun-Sentinel (Palm Beach County, FL), Feb. 22, 2001; *The end of the line; the poor and elderly are among those most disadvantaged as pay phones disappear from our streets*, The Record (Bergen County, NJ), May 6, 2001; Stephanie Kirchgaessner, *Vanishing from the landscape; Payphones in the US*, Financial Times (London), May 16, 2001. For those without a home phone, the removal of a payphone from their neighborhood means that their access to the public telecommunications network has been effectively severed.

The availability of payphones is also critical for residents of rural areas, small towns, and Tribal Lands.[12] When the only payphone in a small town is removed, everyone who relied on that payphone for their communications needs loses access to the public communications network. As explained by the West Virginia Payphone Task Force, "after the general decline in payphone availability, removal of even a single payphone can have a dramatic impact on rural areas." West Virginia Public Service Commission, Payphone Task Force, *Sixth Interim Report* at 5 (2003).

Finally, quick access to a payphone is frequently a matter of critical importance—to report a crime in progress or to summon emergency rescue help. *See, e.g.*, Barbara Egbert, *It was a dark and stormy night. Really*, The Mercury News (San Jose, CA), Mar. 6, 2001 (payphones necessary for emergencies); Shienne Jones, *Lack of payphones makes campus unnecessarily dangerous*, Daily Reveille (Baton Rouge, LA), Apr. 18, 2001.

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[12] With regard to payphones in Tribal Lands, *see, e.g.*, Joe Gardyasz, *Shrinking revenues lead to a few less payphones*, Bismarck Tribune (Bismarck, ND), Apr. 11, 2001.

Thus, because of their affordability and reliability, payphones are used by all segments of the public for many purposes, including as a supplement to wireless services, and are used by millions of Americans as a communications means of last resort. *See, e.g.*, Liza Mundy, *Hearing the call; If you're on the wrong side of the digital divide, what does it take to get by? Thirty-five cents and a glimmer of hope*, The Washington Post Magazine, Sept. 2, 2001 (describing the wide-ranging types of calls made at payphones at an Arlington, Virginia subway station).

The entry of local service competitors serving the PSP segment of the local service market directly promotes the wider deployment of payphones. A vitally important requirement for viable payphone service from a consumer perspective is widespread availability. When a member of the public needs to use a payphone, he or she needs to be reasonably assured that a payphone is located nearby. With major ILECs such as BellSouth and Qwest having exited the payphone market, the preservation of competitive local service alternatives for PSPs has become even more important. The independent PSPs on whom the public increasingly relies for payphone service have the ability to ensure that payphone users benefit from increased local service competition. Local service competition to serve the payphone market promotes the widespread deployment of payphones by ensuring that independent PSPs have available the lowest cost, best quality local exchange service as a critical input in providing payphone service.[13]

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[13] In addition, as discussed in Section III.A below, the CLEC or ILEC serving a payphone plays an important role in enabling PSPs to collect compensation for toll-free calls, thereby enhancing the PSPs' ability to derive sufficient revenue to cover their operating costs.

B. Under *USTA*, The Commission Must Specifically Consider Whether Making Unbundled Switching Available To CLECs Providing Service To PSPs Will Advance The Goals of Section 276

1. PSPs constitute a distinct segment of the local services market

In defining relevant market segments (*e.g.*, by product, geographic area, or customer classes) for purposes of making market-specific unbundling determinations, the Commission must consider the differences between the payphone segment and other segments of the local service market.

First, the PSP market has distinct economic characteristics that distinguish it from both the enterprise market and the mass market. Unlike the enterprise market, the PSP market generally does not have sufficient line concentration to permit the economical use of DS1 service. A PSP typically operates a payphone "route" consisting of dispersed payphone locations, with each payphone using a single voice-grade line. The majority of payphone locations have only one payphone, requiring only one line; thus, payphone locations tend to be at the extreme low end of the line concentration spectrum. Because payphones are a declining industry, the percentage of locations with only one payphone is increasing. As payphone usage is displaced by wireless phone usage, PSPs tend to pursue cost reduction by removing the extra payphones at multi-phone locations. This is generally preferable to removing payphones from single-line locations, where most if not all the revenue will be lost.[14] As a result of the

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[14] When payphones with insufficient call volumes are removed from multi-phone locations, the bulk of the calls previously made at those payphones are not lost. Instead, they migrate to the remaining phone(s). Thus, the PSP saves the costs of operating the removed phones while retaining most of the revenue stream.

economic advantages of removing payphones from multi-phone locations, there are fewer and fewer payphone locations with more than one payphone.

Second, unlike the enterprise market, PSPs have little use for broadband communications channels. Payphone service is fundamentally a voice service with the narrow bandwidth requirements characteristic of voice service.

As discussed in detail in Section III below, the payphone local exchange service market is also different from the mass market in ways that are directly relevant to the question of impairment. At its core, the Commission's impairment analysis asks "whether all potential revenues from entering a market exceed the costs of entry," with the effect that "entry into a market [is] uneconomic." *TRO*, ¶ 84. Under that standard, the Commission must assess the payphone segment of the local exchange market separately from the mass market. Not only are PSPs more expensive to serve, they represent a much smaller revenue opportunity than the average mass market customer. As a result, even if switch-based CLECs were able to serve the mass market, they would not be able to viably provide switch-based service to PSPs.

2. The goals of the Act require a separate analysis of the payphone market segment

In light of the distinct nature of the payphone market and the important role of payphones in the scheme of the Act, *USTA II* requires that the Commission undertake a distinct impairment analysis for the payphone segment of the local service market. In *USTA II*, the court of appeals left the Commission a certain amount of latitude to group dissimilar markets or sub-markets together, in order to limit the administrative burden that would be involved in setting unbundling requirements on a state-by-state, market-by-market basis. Due to the relatively small size of the payphone segment of the

market, the Commission may be tempted to aggregate it with other, superficially similar markets for purposes of its unbundling rules. The Commission may not do so, however, if the result is to disregard evidence that the payphone segment of the market "differs decisively" from broader local exchange markets with respect to the impairment criteria. *USTA II* at 21. Administrative convenience cannot justify submerging the payphone segment of the local services market within a larger market with different material characteristics at the cost of hindering the Act's goals of promoting payphone competition and deployment.

Moreover, when specific goals and policies of the Act weigh heavily on the side of increasing opportunities for competitors to successfully enter a particular segment of the market, the Commission must resolve close questions of fact in favor of finding impairment in that market segment. Even if the Commission cannot determine with certainty whether or not CLECs are impaired in their ability to serve the PSP segment of the market, it should err on the side of determining that they are impaired, and thereby minimize any risk of inadvertently frustrating the statutory payphone service policy.

Finally, even if there is no "impairment" under Section 251(d)(2), the "at a minimum" language of that provision provides authority for the Commission to consider the impact of availability or non-availability of an element on other objectives of the Act. Thus, even if the Commission does not find that switch-based CLECs are impaired in the provision of local exchange service to PSPs, the Commission must still require unbundled local switching ("ULS") to be made available to CLECs for this purpose if necessary to promote payphone competition or the widespread deployment of payphones.

II. THE PAYPHONE SEGMENT OF THE LOCAL SERVICE MARKET HAS THE SAME CHARACTERISTICS THAT LED THE COMMISSION TO FIND THAT SWITCH-BASED CLECs ARE IMPAIRED IN SERVING THE MASS MARKET

As a market made up predominantly of low-line-count locations,[15] the payphone segment of the local service market shares with the mass market all the characteristics that justified the Commission's presumption that CLECs' ability to serve the mass market would be impaired without ULS. [16] Therefore, if the Commission finds that switch-based CLECs continue to be impaired in their ability to serve the mass-market, the Commission must also find that switch-based CLECs are impaired in their ability to serve the payphone segment of the local service market.

A. Relatively Few PSPs Currently Subscribe To Local Service Provided By Switch-Based CLECs

In the *TRO* the Commission found that CLECs "have self-deployed few local circuit switches to serve the mass market." *TRO*, ¶ 438 (footnote omitted). The Commission also found that CLECs who have deployed local circuit switches to serve the enterprise market "are serving extremely few mass market customers." *Id.*, ¶ 441.

The same is true of the payphone segment of the local service market. Switch-based CLECs currently serve few payphones. Some switch-based CLECs have tried to provide local service to PSPs using UNE-L, but none has been able to do so efficiently.

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15 *See* Section I.B above.

16 As discussed in Section III below, however, the payphone market is also distinguishable from the mass market in relevant ways. As a result, even if the Commission found that CLECs were no longer impaired in their ability to serve the mass market, the Commission would be compelled to find that CLECs are impaired in their ability to serve the payphone market.

The few switch-based CLECs that actually provided local service to PSPs have gone bankrupt, have exited the payphone segment of the market, or are providing only a *de minimis* amount of service to PSPs.[17]

The switch-based CLECs that remain in the payphone segment of the market are willing to serve only limited areas. Increasingly, even those CLECs are attempting to terminate service to PSPs. For example, in the last two years the two CLECs offering switch-based service to PSPs in the Detroit area announced that they would "no longer offer payphone lines." *See, e.g.*, Exhibit 1 to these comments (letter from one of the CLECs). With difficulty, these CLECs were persuaded to continue service, but their rates increased, making their service offering considerably less attractive to PSPs.

B. There Is Limited, If Any, Potential For Using Intermodal Alternatives To Serve The Payphone Market

In the *TRO*, the Commission found that there is "limited use of intermodal circuit switching alternatives for the mass market"[18] and that the amount of intermodal use "is insufficient for us to make a finding of no impairment in this market." *TRO*, ¶ 443. The

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[17] A handful of switch-based CLECs did penetrate the payphone segment of the local exchange service market during the period preceding the Commission's order benchmarking CLEC access rates (*Access Charge Reform*, Seventh Report and Order and Further Notice of Proposed Rulemaking, 16 FCC Rcd 9923 (2001)), when the high volumes of access traffic meant payphones yielded high access charge revenue. Since the benchmarking order took effect, switch-based CLECs have generally abandoned the PSP market, although there is a declining base of residual payphone lines from that era still served by switch-based CLECs.

[18] In the *TRO*, the Commission found that only 2.5% of the nation's households subscribe to cable telephony, *TRO* ¶ 444, and that "only three to five percent of CMRS subscribers use their service as a replacement for primary fixed voice wireline service," *Id.* ¶ 445. The percent of PSPs subscribing to either of these alternatives is zero.

Commission also found that the *potential* for use of intermodal alternatives to serve the mass market is limited, because (1) "circuit-switched cable telephone is only available to about 9.6 percent of the total households in the nation," (2) "retrofitting cable systems to support cable telephony requires substantial investment and modification," and (3) "significant technical and operational issues must still be resolved for those cable operators that have not already augmented their networks to offer cable telephony." *Id.*, ¶ 444.

In the payphone segment of the local exchange market, the barriers to the use of intermodal alternatives are even higher. Neither cable systems nor commercial mobile radio services are currently used to provide local service to PSPs. Moreover, few payphones are located in the residential areas that cable systems predominantly serve. Even where payphones are passed by cable systems offering cable telephony, cable system providers are unlikely to be able to serve payphones economically. Cable is a broadband technology. Payphones provide voice service and require only voice-grade lines. PSPs have no use for broadband connections.

As for CMRS, the prices are still too high for CMRS to be attractive to PSPs as a substitute for local wireline service. CMRS prices would have to drop 50-60% for CMRS to be an economical alternative. In addition, wireless service is still too unreliable at present to be usable for the "last resort" emergency and lifeline functions that payphones are expected to perform.

C. Switch-Based CLECs Incur Substantial Hot Cut Costs If They Attempt To Provide Local Service to PSPs

In the *TRO*, the Commission found that a major difference between the enterprise market and the mass market in the unbundled switching context is that the

enterprise market can be economically served by DS1 or higher-capacity lines. With DS1 lines, according to the *TRO*, customer acquisition does not generally result in service disruption or material non-recurring costs, because the DS1 line is typically installed as a separate loop from the customer's existing loops, eliminating the need for a "hot cut." *TRO*, ¶ 451.

The mass market, by contrast, requires DS0 lines. With DS0 lines, the Commission found that customer acquisition does involve service disruption and onerous costs, because cutovers require "hot cuts," in which the ILEC and CLEC must collaborate to physically disconnect the customer's loop from the ILEC switch and reconnect it to the CLEC switch. *Id.*, ¶ 459-75. Largely due to the hot cut problems, the Commission made a general finding that "competing carriers are impaired without access to unbundled local circuit switching for mass market customers." *Id.*, ¶ 459. The Commission concluded that "the operational and economic barriers arising from the hot cut process create an insurmountable disadvantage to carriers seeking to serve the mass market, demonstrating that competitive carriers are impaired without local circuit switching as a UNE." *Id.*, ¶ 475.

Because the payphone segment of the local service market is served predominantly with DS0 lines, it is subject to the same "hot cut" related disruptions and costs that afflict the mass market. Just as the Commission found that these "hot cut" barriers to entry fatally impair switch-based CLECs' ability to provide service to the mass market, the Commission must find that these barriers also impair CLECs seeking to provide service to the payphone segment of the local service market.

D. Other Operational And Economic Factors Pose Equal Or Greater Entry Barriers For The Payphone Segment Of The Local Service Market As For The Mass Market

The Commission also found that other operational and economic factors "can be sufficient to hinder or prevent entry even if impairment caused by hot cuts were fully resolved," and thus may independently "give rise to impairment in a given market" in the absence of unbundled local switching. These factors include "poor incumbent LEC performance in fulfilling unbundling, collocation, and other statutory obligations, difficulties in performing customer migrations between competitive LECs, difficulties in performing collocation cross-connects between competing carriers, and the significant cost disadvantages competitive carriers face in obtaining access to the loop and backhauling the circuit to their own switches." *Id.*, ¶ 476.

The record showing that these kinds of entry barriers can impair switch-based CLECs ability to provide local service to the mass market also establishes that the entry barriers resulting from these operational and economic factors are at least as high for the payphone segment of the market as for the mass market generally. Payphones are fairly evenly distributed throughout the various geographic markets in the nation and among the various ILECs. Thus, even though operational problems such as scarce collocation space and cross-connect difficulties may vary in intensity from ILEC to ILEC, such problems pose at least as high an entry barrier to switch-based CLECs attempting to serve the payphone market as to switch-based CLECs attempting to serve the mass market. Similarly, backhauling and related costs are as likely to pose barriers to entering the payphone segment of the market as to entering any other segment of the market.

* * * *

In sum, the payphone local exchange market shares with the mass market all of the qualities that led the Commission to find that switch-based CLECs are impaired with respect to the mass market. There has been little successful service to PSPs by CLECs using self-provisioned switching; there are no effective intermodal alternatives to the ILEC networks; and the high cost of hot cuts and other barriers that the Commission found to be present with respect to the mass market are at least equally present in the payphone segment of the local exchange market. Therefore, if the Commission once again finds that switch-based CLECs are impaired with respect to the mass market, it must also find that switch-based CLECs are impaired in providing service to PSPs.

III. EVEN IF SWITCH-BASED CLECS' ABILITY TO SERVE THE MASS MARKET IS NOT IMPAIRED, THEIR ABILITY TO SERVE THE PAYPHONE SEGMENT OF THE MARKET CONTINUES TO BE IMPAIRED

Even if the Commission retreats from its general findings regarding the mass market, it must find that switch-based CLECs continue to be impaired in their ability to serve the payphone segment of the local service market. In this section of the comments, the Payphone Commenters assume that the Commission finds that the "hot cut" problem and all of the other economic and operational barriers have been or will be addressed so that, as a general matter, the unavailability of ULS no longer impairs CLECs' ability to serve some or all portions of the mass market. Even if the Commission could justify making such a finding, the Commission still would be

compelled to find that, without access to ULS, CLECs are impaired in their ability to serve the payphone segment of the local exchange market.

If ULS is no longer available, the UNE-P CLECs on whom PSPs primarily rely for an alternative to the ILECs' local service will be compelled to exit the market. These CLECs have established a market niche providing service to PSPs because the availability of unbundled switching enables them to efficiently serve the widely dispersed, low-line-count locations that characterize the payphone segment of the market. If those CLECs can no longer obtain unbundled switching and are compelled to provide their own switches, they can no longer continue to serve their widely dispersed PSP customer base.

To find alternative sources of service, PSPs would have to turn to switch-based CLECs, to the extent that any of them could establish themselves in the mass market. For the reasons given below, however, even assuming that a switch-based CLEC could successfully enter the mass market, the CLEC would nevertheless be impaired with respect to the PSP market because the "potential revenues" from PSP customers would be less than "the costs of entry," into the PSP market. This is the case because (1) the per-line costs that a CLEC would incur in adding a PSP customer are significantly greater than the per-line costs that a CLEC would incur in adding a typical mass market customer, and (2) the per-line revenue opportunities offered by PSPs are extremely limited compared to those that could be expected from a typical mass-market customer, and are likely to be insufficient to enable CLECs to recover the per-line costs of adding PSP customers.

A. CLECs Serving The Mass Market Would Incur Substantially Higher Costs If They Attempt To Add PSPs To Their Customer Base

The per-line costs that a switch-based CLEC would incur in adding a payphone customer are significantly greater than the per-line costs that a CLEC would incur in adding mass market customers and pose a substantial barrier to switch-based CLECs' entry into the payphone segment of the local service market.

1. Switch-based CLECs serving the payphone segment of the market must invest in costly switch upgrades

To serve the payphone segment of the market using its own switch, a switch-based CLEC must ensure that its switch can provide a variety of features essential to PSPs. For example, in order to protect themselves from fraud, PSPs require a variety of blocking and screening features that are not used by the typical mass market customer. To prevent fraud, PSPs almost universally subscribe to international direct dial blocking, and many PSPs also utilize additional anti-fraud features such as 1+ blocking, 10XXX-1+ blocking, 900 number blocking, incoming call blocking, originating line screening, and billed number screening. These features are used exclusively or predominantly by PSPs. *See, e.g., Local Exchange Carriers' Payphone Functions and Features,* Memorandum Opinion and Order, 12 FCC Rcd 17996 (1997) (reviewing proposed rates for various "payphone specific" service features).

In order to serve the payphone segment of the local exchange market, a CLEC must also ensure that its switch can provide Flex ANI, a software-driven feature that generates software defined ANI ii coding digits.[19] Flex ANI plays a key role in the

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[19] ANI ii coding digits are the digit pairs that a LEC transmits to an IXC with the automatic number identification ("ANI"), or billing number, for a call in order to alert the IXC to any special billing precautions or call processing procedures that may be

system established by the Commission in 1996 for IXCs' payment of compensation to PSPs for the use of payphones to place calls to "toll-free" numbers. In the *First Payphone Order* the Commission required LECs to provide, with payphone lines, the capability to transmit unique identifiers for calls originating from payphones, so that IXCs can identify the calls in their networks for which they owe payphone compensation. *First Payphone Order*, ¶ 98. Although ILEC switches in 1996 already had "hard-coded" identifiers for the payphone lines typically used by ILEC payphones, there was no comparable "hard-coded" identifier for the payphone lines used by the independent PSP community, which represents the primary if not the only payphone market available to CLECs. *See* note 5 above. In order to identify calls transmitted on the payphone lines used by independent PSPs, ILECs were required to upgrade their switches to incorporate Flex ANI capability. *See Coding Digit Waiver Order*.

Although the costs of adding Flex ANI and other payphone specific features to their switches are almost entirely "sunk" costs for the ILECs,[20] CLECs would have to pay for the inclusion of Flex ANI capability and other features in their switches. According to data provided by the USTA in the Commission's proceeding to implement Section 276, Flex ANI costs for midsize and small ILECs averaged $9,000 per switch even when the Flex ANI software was already loaded. *Bureau Coding Digit Waiver*

(Footnote continued)
appropriate for the call. The digits may also identify the class of service of the originating line, e.g., business, residential, restricted, etc.

[20] ILECs recovered their Flex ANI investment costs in special tariff charges assessed on payphone lines—both independent PSP payphones and the large base of the ILECs' own payphones—over a limited recovery period. *Coding Digit Waiver Order*, ¶¶ 38-39.

Order, ¶ 74. Where an upgrade was required (as is likely for the switches used by CLECs) the cost was substantially greater. The barrier posed by Flex ANI costs looms particularly high for a CLEC, who likely must serve hundreds of payphone lines from a single switch before even coming close to getting an acceptable margin on its investment in Flex ANI technology. There are few areas where a CLEC can confidently expect to reach that level of penetration of the PSP market.

The ILECs themselves recognized that the cost of adding Flex ANI functionality to existing switches was prohibitive in many central offices, and on that basis many smaller ILECs were granted waivers of the requirement that they provide FLEX ANI functionality. *Id.*, ¶ 76. In granting the waiver, the Commission recognized that for small and mid-sized LECs, who do not have a large base of payphone customers over which to spread the cost, "the cost of implementing FLEX ANI would be unreasonably burdensome." *Id.* In other words, the Commission found that small LECs could not economically recover the costs of installing FLEX ANI over a small number of payphones. The same is equally true for switch-based CLECs attempting to serve PSPs. Indeed, CLECs have cited the Flex ANI cost burden as a reason for terminating service to PSPs. *See* Exhibit 1.

As a related expense, LECs are required to support the payment of compensation by offering IXCs, on a monthly basis, verification lists identifying PSPs and the lines to which each PSP subscribes, so that IXCs can ensure they are paying the correct PSPs for each toll-free call they receive from payphones.[21] Thus, a CLEC must have a sufficient share of the payphone market to justify the costs—and the significant administrative

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[21] *Id.*, ¶ 72.

burden—of establishing the capability to support IXCs' payphone compensation by providing monthly verification lists of PSPs and their lines. CLECs who are serving the mass market and only incidentally pick up PSPs as customers are unlikely to be able to justify incurring the costs of this compensation-support capability.

2. CLECs are unlikely to be able to serve efficiently the dispersed lines characteristic of the payphone market

Unlike the mass-market customer, who generally has one or a few lines at a single location, PSPs typically have dozens or hundreds of payphone lines dispersed over a wide area, which may cover an entire state or region.[22] Serving this type of customer is likely to be substantially more complicated and costly on a per-line basis than serving the typical mass-market customer. Like enterprise customers of comparable size, PSPs gain major advantages if they can have all their local service needs satisfied by a single LEC. To provide this kind of single-source service, a CLEC not only must have a switch within reach of every one of the PSP's locations; the CLEC must also have a collocation site at each ILEC switch that serves one or more of the PSP's locations. The likelihood that any single CLEC will have deployed switches and collocation sites to this extent is relatively low; yet, if a CLEC is unable to serve all of a PSP's locations, the CLEC is likely to lose that PSP as a customer.

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[22] PSPs, however, are not comparable to enterprise customers either. Unlike enterprise customers of comparable size, who are likely to have only one or two locations that must be served, a typical PSP will have dozens of widely dispersed locations, every one of which must be accessible from a CLEC switch, and none of which can support a high-capacity line.

By contrast, a Bell company or other large ILEC is much more likely than a switch-based CLEC to be able to serve all of the PSP's locations, or at least a substantial percentage of those locations.

B. The Revenue Opportunities Available From Payphone Lines Are Much More Limited Than Those Available From Mass Market Lines And Are Unlikely To Be Sufficient To Recoup The Costs Of Serving Payphones From Self-Provisioned Switches

While the costs incurred by CLECs in serving payphone lines from self-provisioned switches are likely to be substantially greater, on a per-line basis, than the costs they incur in serving mass-market customers, the revenues available from a payphone line are likely to be far lower than the revenues available from a typical mass market customer's line. Indeed, these reduced revenue opportunities would impair switch-based CLECs in providing exchange service to payphones even if it were not more costly to provide exchange service to payphones.

The Commission has found that revenue opportunities are relevant to the impairment determination. *See, e.g., TRO,* ¶¶ 258 (revenue opportunities from use of whole loops offset the costs of purchasing whole loops), 274 (revenue opportunities from fiber-to-the-home ("FTTH") deployment are sufficient to overcome entry barriers resulting from denial of FTTH loop elements). The available revenues from switch-based provision of local service to PSPs are unlikely to offset the costs imposed by the hot cut requirement and other entry barriers described above.

First, there are no opportunities for CLECs to sell vertical services such as three-way calling, caller ID, call waiting, voice messaging, etc., to PSPs. With the exception of a few specialized features like Flex ANI, that mainly involve non-recurring costs, PSPs

neither require nor desire vertical services. Because PSPs cannot market such services to their own end user customers, they are unwilling to pay to obtain them from LECs.

Second, there are few opportunities at present to market internet service at payphones. As a result, there is no significant potential for payphone lines to be converted to or supplemented by broadband service.

Third, even basic service revenue opportunities from payphone lines are extremely limited. In many states, the ILECs' tariffed rate for payphone line service is lower than the rate for a regular business line.

As a result of all of these factors, average CLEC revenue for a payphone line is dramatically lower than revenue for a typical business line. According to available data, total revenue on a payphone line—including the basic line charge and all other fees and surcharges assessed on the PSP—is, on average, $20-25 per month.[23] For one large PSP with more than 20,000 payphones, its total CLEC charges per line per month average less than $17 across several states.

C. Tests Established By The Commission To Gauge The Level Of Impairment In The Mass Market Will Likely Underestimate The Level Of Impairment In The Payphone Market

In summary, switch-based CLECs will incur substantially higher costs, and can expect substantially lower revenues, when serving a payphone line than when serving a typical mass market line. Therefore, any test established by the Commission to implement the "nuanced" standard of impairment required by *USTA I* and *USTA II* with respect to the mass market will not accurately capture the level of impairment in the payphone segment of the market, and in fact will underpredict the level of

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[23] These costs still loom large as a percentage of PSPs' operating budgets.

impairment if applied to that market segment. For example, the three-CLEC "trigger" established by the FCC in the *TRO* for the use of state commissions in making "nuanced" impairment determinations with respect to the mass market (*TRO*, ¶¶ 501-02) cannot validly be used to justify withholding the availability of ULS for purposes of serving the payphone market. If three CLECs are serving the mass market from self-provisioned switches, it cannot be automatically inferred that those CLECs will be unimpaired in serving the payphone segment of the market – especially if none of those CLECs serves a significant number of payphones. Other types of mass market impairment tests are likely to be equally suspect if automatically applied to the payphone market.

Any doubts as to whether or not self-provisioning CLECs are impaired in serving the payphone segment of the market should be resolved in favor of determining that they *are* impaired. As discussed in Section I, above, the clear Congressional policy to promote payphone service competition and the widespread deployment of payphones requires that the Commission resolve doubts in favor of policies that will promote those purposes.[24]

Finally, even if the problems encountered by switch-based CLECs in serving the payphone segment of the market do not meet the *USTA I* and *USTA II* standard of statutory "impairment," the Commission should require the continued availability of unbundled switching in order to advance the goals of Section 276. Unbundled

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[24] As discussed in Section I above, the Congressional policies in support of payphone competition and deployment come into play both in the "impairment" analysis itself, where the Commission should resolve doubts in favor of finding impairment, and as independent factors that must be considered under the "at a minimum" provision even in the absence of actual impairment.

switching will clearly promote payphone service competition and deployment, while its unavailability will not do so. Given the critical dependence of PSPs on local exchange service in order to operate their payphone service businesses, and given the high percentage of PSPs' operating costs that local exchange service charges represent, even temporary disabilities suffered by CLECs in serving the payphone market are likely to have significant negative effects on payphone competition and deployment.

IV. COUNTERVAILING FACTORS IDENTIFIED IN *USTA II* DO NOT ALTER THE COMMISSION'S IMPAIRMENT ANALYSIS

A. Tariffed Services Do Not Offer A Viable Alternative For CLECs Serving The Payphone Market

In *USTA II*, the court faulted the Commission's TRO for failing to factor the availability of tariffed services into the impairment analysis. *USTA II* at 576-77. For purposes of serving the payphone segment of the local exchange service market, the only tariffed service that is relevant to CLECs is the ILEC's payphone line service, which the Commission's rules require ILECs to make available at wholesale rates to CLECs for resale to PSPs. Whatever theoretical potential there might be for CLECs to serve the payphone segment of the market by reselling payphone lines, practical experience over the last eight years has shown that the margins between wholesale and retail payphone line rates are too narrow to permit CLECs to operate profitably as payphone line resellers. CLECs who attempted to enter the payphone segment of the market as resellers of ILECs' payphone line service found that they could not do so profitably and dropped out.

B. Retaining An Unbundled Switching Requirement For The Payphone Segment Of The Local Service Market Will Not Adversely Affect Universal Service

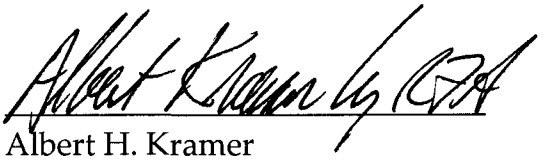
In the *Further Notice,* the Commission invites parties to comment on the impact that their recommendations may have on universal service policies. *Further Notice,* ¶ 9. Retaining unbundled switching for the payphone market will not have a significant adverse effect on universal service. First, the payphone segment of the local service market is a small fraction of the nationwide telecommunications market. Any reduction in ILEC revenues resulting from the continued availability of unbundled switching for the payphone market will have no noticeable impact on universal service. Second, any slight negative effect on universal service will be outweighed by a far more significant countervailing positive effect. As discussed in Section I, the widespread deployment of payphone service in itself makes a huge contribution to universal service, both by making telephone service available to people who have no residential telephone service and by making service available to people with mobile communications needs who have no wireless alternative or who need a backup when their wireless phones or wireless services are temporarily unavailable. In short, as a key "service of last resort" payphones form an essential part of the nation's universal service backbone.

CONCLUSION

For the reasons shown above, regardless of the outcome of the Commission's impairment inquiry for the mass market, the Commission should find that, without access to unbundled local switching, CLECs are impaired in their ability to serve the distinct payphone segment of the local exchange market. Even if the Commission *cannot* conclusively determine that there is impairment in the payphone market segment, the Commission must still require that, to advance the goals of Section 276, ILECs must make unbundled switching available to CLECs for use in serving the payphone segment of the local exchange market.

Dated: October 4, 2004

Respectfully submitted,



Albert H. Kramer
Robert F. Aldrich
Jacob S. Farber
Dickstein Shapiro Morin & Oshinsky LLP
2101 L Street, N.W.
Washington, D.C. 20037-1526
(202) 828-2226

Attorneys for the Payphone Commenters

EXHIBIT 1

March 5, 2002

Dear McLeodUSA Customer:

To date, you have received pay phone access line service. Thank you for your business with McLeodUSA. We have recently completed a review of our product offering in your area.

Based upon this review, we have determined that we are no longer able to provide the Flex ANI functionality that allows you to receive dial-around compensation for pay phone calls.

Rather than attempt to provide pay phone line access service without this feature, we have determined that, effective May 15, 2002, McLeodUSA will no longer offer pay phone lines in your area.

As a result, you will need to arrange to have your pay phone service moved to another provider by May 15, 2002.

A McLeodUSA representative will be contacting you soon, if they have not already, to further discuss your options. If you have any questions, please contact your local McLeodUSA Account Manager.

Your Customer Care Team

A2RV

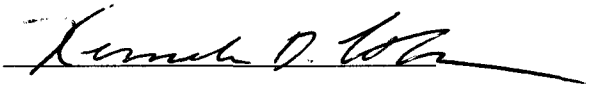
CERTIFICATE OF SERVICE

I hereby certify that, on October 4, 2004 , a copy of the foregoing comments of the Payphone Commenters, was served by electronic mail on the parties listed below:

By Electronic Mail

Janice M. Miles
Wireline Competition Bureau
Federal Communications Commission
Room 5A-365
445 12th Street, SW
Washington, D.C. 20554
janice.miles@fcc.gov

Best Copy and Printing, Inc.
Portals II
445 12th Street SW
Room CY-B402
Washington, D.C. 20554
www.bcpiweb.com



Kenneth D. Colson

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